

BEFORE THE

**Federal Communications Commission**

WASHINGTON, D C 20554

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Federal Communication Commission  
Bureau / Office**ORIGINAL**

In the Matter of	)	
	)	
Amendment of Section 73.202(b)	)	MB Docket No 03-222
Table of Allotments,	)	RM-10812
FM Broadcast Stations	)	
(Charlotte and Grand Ledge, Michigan)	)	
	)	
In re Application of	)	
	)	
Christian Broadcasting System, Ltd	)	CDBS No 20040128AJX
	)	
For Modification of Station WLCM(AM) to	)	
Change its Community of License from	)	
Charlotte, Michigan, to Holt, Michigan	)	
To		Assistant Chief, Audio Division, Media Bureau

**OPPOSITION TO MOTION TO DISMISS COUNTERPROPOSAL**

Christian Broadcasting System, Ltd ("CBSL"), licensee of, *inter alia*, Station WLCM(AM), Charlotte, Michigan, herein opposes the motion, filed December 30, 2003, by Rubber City Radio Group ("RCRG") to dismiss CBSL's counterproposal in MB Docket No 03-222. In opposition, the following is stated

**I. Background**

RCRG's Station WQTX(FM) and CBSL's Station WLCM(AM) are the only two stations licensed to Charlotte, Michigan. In its Petition for Rule Making filed March 6, 2003, RCRG

requested that the FM Table of Allotments be amended to delete Channel 224A from Charlotte, Michigan, allot Channel 225A at Grand Ledge, Michigan and modify the WQTX(FM) license to specify operation on the new Grand Ledge allotment. Both the RCRG petition and the Commission's subsequently issued *Notice of Proposed Rule Making*, DA 03-3228 (Assistant Chief, Audio Division, released October 24, 2003), stated that the allotment of Channel 225A to Grand Ledge would not deprive Charlotte of its sole local transmission outlet because WLCM is licensed to that community.

Significantly, absent extraordinary circumstances, the Commission will not permit a station to change its community of license if that change would deprive its existing community of license of its only local transmission service. *See Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870, ¶ 28 (1989) ("*Community of License*"), *recon granted in part*, 5 FCC Rcd 7094 (1990) ("*Community of License Reconsideration*").

CBSL also desires to change the community of license of its Charlotte station. Specifically, CBSL seeks to have Holt, Michigan, designated as WLCM's principal community. Through its "Comments and Counterproposal" filed in the above-captioned proceeding on December 15, 2003, CBSL announced it would file an application in the then-upcoming AM filing window for a major modification of WLCM's license to specify Holt as the station's community of license. CBSL also presented voluminous data regarding the independent status of Holt as a community.

CBSL indeed filed an application to change WLCM's community of license to Holt (CBSL No. 20041028AJX). Thus, the proposals of RCRG and CBSL are in conflict. Absent a waiver of the Commission's policy, only one of the proposals can be granted because if both were granted, Charlotte would be left without a local station.

On reconsideration of *Community of License*, the Commission was confronted with the question of what would happen if AM and FM licensees in the same community each requested a change in community of license and the public interest was best served by retention of one of these stations in the original community. The Commission responded: “In this situation, we believe the *request* of the AM licensee should be generally preferred over that of the FM licensee, provided that the AM licensee’s *request* is filed prior to the expiration of the comment period for the Notice of Proposed Rule Making proposing the FM licensee’s request.” *Community of License Reconsideration, supra*, at ¶ 23 (emphasis added).

At the time *Community of License Reconsideration* was adopted, an AM licensee could file an application for a major modification at any time. Thereafter, the Commission decided that it would accept applications for new AM stations and for major modification of existing stations only during specified window filing periods. See *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, 13 FCC Rcd 15920, ¶¶ 137-138 (1998).

On November 6, 2003, the Commission announced that a filing window for applications for new AM stations and for major modification of existing stations would be open from January 26 through January 30, 2004. It was during this window that CBSL filed its application to change WLCM’s community of license to Holt.

## II. Argument

RCRG argues that CBSL has not filed a counterproposal. To support its argument, RCRG quotes *Implementation of BC Docket 80-90*, 5 FCC Rcd 931 (1990). “[A counterproposal is] a

proposal for an alternative and mutually exclusive allotment or set of allotments in the context of the proceeding in which the proposal is made ”

Most clearly, CBSL’s proposal to move the WLCM allotment from Charlotte to Holt *is* mutually exclusive with RCRG’s proposal to move WQTX to Grand Ledge. The Commission’s policy, barring circumstances not present here, precludes grant of both proposals. *E.g., Community of License Reconsideration, supra*, at ¶¶ 15-19. If the grant of one proposal will effectively preclude the grant of the other, the proposals must be deemed mutually exclusive. Indeed, in *Community of License Reconsideration*, the Commission obviously considered the proposals of an AM station and an FM station in the same community through which each seeks to change its community of license as mutually exclusive. *Id.* at ¶ 23.

RCRG asserts that CBSL’s proposal cannot be given cognizance because an *application* to change WLCM’s community of license was not and could not be filed by the December 15, 2003, deadline for counterproposals in MB Docket No. 03-222.

Significantly, the language in *Community of License Reconsideration* does not support that argument; the Commission used the word “request” and not “application.” Presumably, if it had intended that the filing of an application would be the only manner in which an AM licensee could make its “request,” the Commission would have said so. It did not.

Essentially, RCRG argues that under the circumstances present if an AM filing window does not happen to be open during the FM allotment counterproposal period, the AM licensee is just out of luck and its proposal is to be given no consideration. That argument does violence to the *Ashbacker* doctrine. The doctrine is rooted in the Supreme Court decision of *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945). In *Kessler v. FCC*, 326 F.2d 673 (D.C. Cir. 1963), the Court decided

that *Ashbacker* procedural rights applied not only to applicants, but also to potential applicants whose applications would have been mutually exclusive but for an application freeze. Similarly here, there is no doubt that the WLCM major modification application could have and would have been filed prior to December 15, 2003, but for the operation of the Commission's window filing procedure, which is tantamount to an application freeze. Clearly, CBSL's proposal is mutually exclusive with RCRG's and cannot be simply brushed aside.

RCRG further argues that consideration of CBSL's proposal in MB Docket No. 03-222 is unworkable because the proceeding could not be concluded until it is determined whether CBSL's application may be granted. But the fact that a proceeding may take a considerable period of time to resolve does not negate a proponent's right to have its proposal considered. It is quite possible the Commission may wish to consider development of more specific procedures for dealing with situations such as that presented here, but the absence of those more specific procedures does not permit dismissal of CBSL's timely request.

RCRG argues that because its proposal was filed first, it should be preferred. But nothing in *Community of License Reconsideration* supports that position. Indeed, to the contrary, the Commission ruled that an AM licensee's request, if filed prior to the expiration of the counterproposal period, is to be preferred. Had the Commission intended to adopt a "first come-first served" procedure, it would have done so.

The cases RCRG cites are not on point. *Harrisburg and Albemarle, North Carolina*, 7 FCC Red 108 (1992), *recon. denied*, 11 FCC Red 2511 (1996), involved two FM allotment proposals that were not in technical conflict. While the Commission decided to treat the proposals together for administrative convenience, the grant of the successful proposal (a new Class A drop-in for

Harrisburg) did not dictate, *ipso facto* the denial of the other proposal (relocation of an existing station). The relocation proposal was denied only after detailed consideration of numerous factors, including the “fatal flaw of unacceptable losses” in the station’s existing reception area. 11 FCC Rcd at ¶¶ 18, 22. In contrast, given the Commission’s firm policy of retaining at least one local transmission service in a community, the RCRG and CBSL proposals *are* mutually exclusive in that the grant of one proposal must also result in the denial of the other.

The other case RCRG cites, *Galveston and Missouri City, Texas*, 16 FCC Rcd 747 (2001), involved a situation in which a proposal to change community of license of Station KQQK from Galveston, Texas, to Missouri City, Texas, was denied because in a separate allotment proceeding decided earlier, Missouri City gained its first local transmission service. Under those circumstances, the retention of KQQK as one of the three aural services of the larger community of Galveston was preferred over providing Missouri City its second FM allotment. Here, of course, both the RCRG and CBSL proposals are to be considered in the same proceeding. The fact one was filed before the other is of no consequence.

WHEREFORE, in light of circumstances present, RCRG's motion to dismiss CBSL's counterproposal should be DENIED

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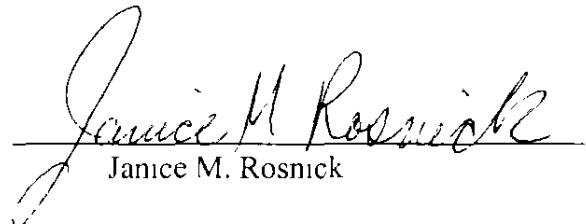
**CERTIFICATE OF SERVICE**

I, Janice M Rosnick, hereby certify that on this 2<sup>nd</sup> day of February, 2004, copies of the foregoing **OPPOSITION TO MOTION TO DISMISS COUNTERPROPOSAL** were hand-delivered or mailed, via first-class, postage prepaid, to the following:

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